# Introduction

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# Introduction

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This book explores the controversial role of ancient Rome and its legal heritage, Roman law, in the making of the idea of a shared European legal tradition. This derives from the use of the memory of the classical past in the political upheavals of the early twentieth century. For example, the classical civilization was often used to provide legitimacy to contemporary political causes by seeking parallels between historical examples and current policies. This reaching to the past for guidance for the future has, as a phenomenon, a long history, especially in times of crises. This book argues that a group of émigré scholars who fled totalitarianism had a crucial role in the formation of the European project that lead to integration after the war. While the Nazi and fascist states had legitimated their rule through references to the classical past, in the field of law and the example of ancient Roman law, these scholars would reinterpret the past to demonstrate how the Roman legal heritage was in fact in complete opposition to the totalitarian theories of law.[1]

One of the most beloved historians writing about the ancient world, Jérôme Carcopino (1881–1970), published in 1940 his still popular *La vie Quotidienne à Rome à l'Apogée de l'Empire* (*Daily Life in Ancient Rome*) during the height of the Second World War. In it, he paints an engaging picture of life in ancient Rome during its height, describing it from the viewpoint of the individual on the street. What is less known is that after the fall of France in June 1940, Carcopino became a supporter of the Vichy regime that collaborated with the German occupiers. Carcopino was made minister of education and he would scrupulously see that the programmes and policies of the Vichy regime that were often racist and anti-Semitic were enforced. Jewish members of academia were expelled and ultra-nationalist ideology was promoted. Antiquity and its civilization became for many across the political spectrum a touchstone in turbulent times. The past or at least glorious images of the past were seen as providing a vision of the future.[2] This book is about such visions and how the uses of the past to provide legitimacy for ideas.

Carcopino was, however, at the same time, shielding from dismissal the historian Marc Bloch (1886–1944), a Jew who became an active member of the Resistance.[3] The vision of Carcopino was that Europe and France were the true successors of ancient civilization. The example of Carcopino is fitting in another respect that is central to this book; it shows how when approached at an intimate level, contradictions and inconsistencies push aside neat categories of friend and foe. While the stories of a great turn towards enlightened ideas of justice and the European heritage after the catastrophe of the Second World War may appeal to our conscience, what we want to

demonstrate is how upon closer inspection there are inconvenient continuities and awkward pasts that bring the history into sharper relief.

The rise of totalitarianism in Europe during the interwar period was felt acutely in academic scholarship because the totalitarian dictatorships in Germany and Italy, not to mention the Soviet Union, were intent on controlling the production of knowledge. The field of Roman law, which had traditionally enjoyed prominence in Continental legal academia, faced very different challenges. In Germany, the Nazi regime had declared the eradication of Roman law as one of its aims,[4] while in Italy Roman law enjoyed the same favour that was accorded to the classics, as a part of the hallowed *Romanità* that the fascists idealized. At the same time, Roman law faced a crisis in the reforms of legal education, where the advent of modern codifications led to its teaching being cut. For professors of Roman law who were of Jewish ancestry or politically opposed to the new regimes the crisis was equally a personal one. They faced expulsion from office and exile, often ending up in places (such as the United States or Britain) where the expertise they had was in very little demand. Numerically, this group of professors was not very large. To Britain, there came Fritz Pringsheim (1882–1967), Fritz Schulz (1879–1957), David Daube (1909–99) and Arnold Ehrhardt (1903–65). Of those, the last mentioned ended up finishing his academic career and becoming a vicar in Manchester. To the United States, there went Ernst Levy (1881–1968), Adolf Berger (1882–1962), Ernst Rabel (1874–1955), Hans Julius Wolff, (1902–83), Eberhard Bruck (1877–1960), Richard Honig (1890–1981) and Gerhart Husserl (1893–1973).

In contemporary scholarship, Roman law is widely considered to be the foundation of European legal culture and an inherent source of unity within European law. The purpose of this book is to explore the emergence of this idea of Roman law as an idealized shared heritage, tracing its origins among exiled German scholars in Britain during the Nazi regime, as well as the German and Italian scholars who either stayed behind or joined totalitarian regimes. The book follows the spread and influence of these ideas in Europe after the Second World War as part of the larger enthusiasm for European unity. The central claim is that the rise of the importance of Roman law was a reaction against the crisis of jurisprudence in the face of Nazi ideas of racial and ultra-nationalistic law, leading to the establishment of the idea of Europe founded on shared legal principles. The aim is to trace the crisis and rebirth of Roman law from the 1930s onwards in Europe in its intellectual context. At its centre are a group of émigré scholars who fled Nazi persecution to Britain and began to reinvent the role and nature of Roman law in European history. Equally important were the ones who stayed on the Continent, adapting their scholarship to the wishes of the new regimes, or remaining purposefully apolitical (a position often described as inner exile), such as Paul Koschaker or Franz Wieacker. They too would write about Europe, but of a Europe of exclusive Western culture in opposition to communism and Eastern influences, replicating trends of both Nazi and fascist propaganda. What the book argues is that after the war they would find a new cause in the European character of Roman law, leading to its revival as the roots of European legal tradition. In Britain, the influx of top-level specialists in Roman law led to a renaissance in the field, one that eventually sought to link even Britain to the Roman law tradition.

The book will demonstrate how the post-war beginnings of European integration brought a new urgency to the ideas of shared European traditions, and Roman law was in a privileged position to take the role of a shared origin for European jurisprudence in these discussions. At the same time, it seeks to critically engage with the narratives of European heritage and questions the teleological constructs of the European idea and its past. A major part of the controversies about history, law and culture continues to be the use of the past for present purposes. Classical culture and the legacy of ancient civilizations were enthusiastically embraced by authoritarian nationalists like Carcopino or Italian fascists, but equally by the Europeanists seeking to find a counterpoint to the totalitarian ideas.

The discussions over the European legal heritage have a large number of conceptual peculiarities that have different connotations in various historical layers. One example is the concept of Roman law itself. In European legal history, Roman law meant the law of the ancient Roman Empire, but more importantly it was used as a code word for the European legal tradition, also known as civil law. This tradition had as its common denominator that which was derived from the foundations laid by ancient Roman legal writings. Roman law was not only a legal system; but due to its emphasis on commerce and property rights, it also had distinct ideological underpinnings in the Continental European debates from the nineteenth to the twentieth centuries. In these discussions, Roman law was presented as a system that promoted capitalistic oppression and dismissed the ideas of social civil law such as the protections of weaker parties in contractual relations or the safeguarding of land rights. While elements of Roman law could be used to promote a liberal or a reformist agenda, most often it was resorted to by conservative authors.[5] This was due to the easily conservative nature of tradition, which meant in this case that if the content of the law was drawn from the past, the law could easily be petrified and ossified. Legal and social reform, especially one that could be realized through legislative acts, could be stymied by referring to the tradition. Not coincidentally, this resistance towards legislative reform was a reason why Roman law was popular in many authoritarian regimes, from apartheid South Africa to some military juntas in South America.

After the war and the reorientation of Europe as a bastion of liberal democracy against totalitarian communism, the idea of Europe and the cause of freedom and justice were accepted on both sides of the political spectrum, with different overtones (Duranti 2017). The relevance of these debates today stems in part from the currency that the idea of a shared European legal heritage has for the European project. Influential authors have depicted the European tradition as a foundation on which a new unity of European law may be built. Beginning from the 1990s, different strands of the so-called European private law project have sought to make this vision a reality. The project sought to extend the European unification to the realm of private law, advancing the harmonization of the law between Member States. A part of this quest has been to create a new understanding of the different kinds of European legal traditions and their linkages.

Among others, Reinhard Zimmermann maintained that the emerging common law of Europe should be informed by the shared heritage of the reception of Roman law, if not ancient Roman law itself. This meant that Roman law, through its history, could

lead the way in showing how a common legal tradition may be established through an intellectual unity. Therefore, Roman law has both nothing and everything to do with the new common law. Rather than laws or norms themselves, Zimmermann speaks of a shared legal culture that was based on legal science. This vision is one of past unity in law, born through a series of exchanges and transmissions, where both scholars and texts were moving on a European scale. Of particular importance in his theory is the shared historical past and influences between English private law tradition and the European heritage. In his vision, inspired by this precedent, a new *ius commune* could be formed based on shared values, methods and principles (Zimmermann 2011). This vision of the past unity has been heavily criticized by opponents claiming that national traditions have been even more influential and the Europeanist vision is a false hope.[6]

Other critics have noted how the concept of European private law projects its historical vision as a kind of teleology, a projection rather than a statement of fact. This teleology works as a kind of a long process of harmonization of private law of the past and the future simultaneously.[7] At the same time, the whole vision of a European private law has come under fundamental criticism from the historical side, where, for example, its historical precedent of *ius commune* has itself come under new scrutiny (Wijffels 2000).

The historical debate of a shared European legal heritage has thus become something of a hostage to the contemporary debate over the future of the European private law project and the drive for a European civil code. However, the concepts of unification are not themselves in harmony, with many disagreements on how to proceed with unification, from the bottom up or top down or with initiatives like Lando's *Commission on European Contract Law*, Bussani and Mattei's *Trento Common Core Project* or the *Study Group on a European Civil Code* presenting different visions for the future.[8]

In these endeavours, the historical past has a somewhat uneasy position as a legitimator and the source of the idea of the shared roots. For example, in their influential criticism on the Draft Common Frame of Reference, Eidenmüller et al. (including Zimmermann) recognize how legal historians have 'helped us to recognize the common ground shared by Europe's modern national legal systems'.[9]

Zimmermann's work on the Roman legal tradition and its relationship with the European legal development has been a conspicuous presence in the European legal discourse since the 1990s. Zimmermann's defence of Roman law echoed that of Paul Koschaker, even to the extent that one of his articles had the same title. While he emphasizes the European character of law, he remains careful to insist that as in all European culture, there is a mixture of unity and plurality which prevents a simplistic model of continuities to be applied. Rather, there is a common groundwork laid by the Roman jurists, especially in the field of private law, which is evident in all European legal systems. While the British legal system has, at least by the accounts given by nationalistic authors, lived in splendid isolation, this was hardly the case as influences and interpretations travelled across Europe, including the common law. The tracing of the shared roots of common law and civil law has led to a lasting interest in mixed legal systems, for instance those of South Africa or Scotland, which both have a significant element of Roman law influence.[10] Whatever implications these ideas would then have

for the European private law projects or even the harmonization of law is, even for Zimmermann, a matter of dispute. Especially now with the repercussions of the Brexit vote, it remains to be seen whether the inclusion of Britain to the European legal ambit proves to be solely of historical relevance.

In addition to the importance of Roman law in the justification of the unification of private law, the legal foundation it provided was an important reference point to the issues of tradition and governance. Even though both the modern state and the ancient Roman Empire were founded on the basic principle that the state was in theory sovereign and thus exercised unfettered power, the European heritage of constitutionalism operated on two basic principles: liberty and rule of law. The first meant in its most basic form that men were free persons, not the property of their ruler. The second meant that even though rulers would have power, they were still bound by the legal order, if not by the state law then a legal order derived from God or nature (Pagden 2002: 4). In a democratic or even in a constitutional order, these principles were mere theoretical musings. However, with the advent of the totalitarian states, they were subject to an unprecedented attack. Especially after the beginning of the war, the Nazi and fascist states turned law itself into an instrument of terror. While the formalities of law were observed, in practice the result was the 'devaluation of historic legal norms and the perversion of traditional judicial procedure' that evolved from an 'explicit rejection of principles underlying both common and Roman (civil) law systems' (Rachlin 2013: 80). Against such a reversal of the ideas of justice, equality and the rule of law, the references to the tradition based on Roman law shared by most of Europe were a call to fundamental values.

One of the impacts of the scholarly exodus precipitated by the rise of totalitarianism in Europe was the spread of new ideas and conceptions. In this book, the foundational value of Roman law to the European legal heritage was one of these ideas. This was not to say that Roman law and its cultural value were not familiar in Britain and the United States, but rather that such a conviction was not spread to a similar degree. Thus, beginning from the nineteenth century, there existed a lament that the greatness of the Roman law tradition was not recognized and known in Britain. For example, Tomkins and Jencken wrote in their 1870 work on Roman law that they had a 'hope of awakening an interest in this country in the study of the Modern Roman Law', the 'feebleness' of which had been noted even on the Continent. In their view, Roman law was the root which was then passed on to the legal systems of the 'European and Transatlantic nations' (Tomkins and Jencken 1870: ix–xiii). It is uncontroversial that the influx of émigrés to Britain led to a new flourishing in the field of Roman law, where much of the subsequent generation of scholars, such as Tony Honoré, Alan Watson or Peter Stein, was trained by these exiles. In addition to a new and extraordinarily well-trained group of scholars, the émigrés brought with them ideas about the role of Roman law in modern society and law.

However, even within the European countries where the legal system was based on Roman law, there was continuing discourse on the value of Roman law in the legal system, be it in legal education or the interpretation of law. This discourse had come to a head in the much-discussed crisis of Roman law that had reigned from the early 1900s onwards and which only intensified with the Nazi revolution after 1933. In part,

the issues that were facing Roman law scholars in the 1930s were the same that had troubled Roman law scholars earlier, namely how to link Roman law and modern law. For example, Johannes Voet (1647–1713), one of the most celebrated jurists of the so-called *usus modernus Pandectarum*, grappled with similar questions in his works. Voet maintained that Roman law should be used and studied because it offers solutions, models and principles that help in resolving contemporary issues. However, it also gave models and principles through which disputes between jurisdictions could be solved by applying principles that were acceptable to both parties, that is, the rules of Roman law (Voet 1955: 4–6). The famous notion of Goethe about the influence of Roman law in European history compares it to a duck. Sometimes it is eminently visible, swimming on the surface, sometimes invisible under the surface, but always it is there (Eckermann 1971: 313). The simile about ducks though hides something of the usages of Roman law, where Roman law has, in addition to its own uses in the field of law, been displayed for the benefit of ulterior motives. As with the definition by Voet, Roman law could be seen as a secondary source of law with superior qualities and prestige. However, it could equally be seen as a supranational corrective to the power of the state, an inherently correct law like natural law, or more recently, human rights.

These early twentieth-century revivalist ideas of Roman law took place in a period where considerations of law and society were in a state of flux both in Europe and North America. Legal realism and other critics of formalism such as Marxism raised social facts before legal norms, while in totalitarian regimes there was a stated preference for power (or politics) over law. Even within the democratic states, the expansion of state power and the extent of state interventions grew at an extraordinary pace. Arguably, this constitutional process had begun already with the First World War, but the triumph of the executive powers during the fascist years marks a true revolution in that sphere (Thornhill 2014). This led to the simultaneous need to reinforce the position of the individual and, arguably, to the emergence of human rights as the prime concept in the modern relation between state and individual.

One of the testaments of the malleability of the Roman law tradition is that it could be used with equal effectiveness in liberal, conservative, authoritarian or even totalitarian contexts. Even in the countries of Eastern Europe where a system of historical Marxism was adopted in legal education, the position of Roman law suffered only a minor setback. Even though the Communist regimes were in theory committed to the idea that the political and legal systems were inseparable and thus the ideology of the regime was primary to the doctrine of the law, the system of private law remained in countries like Poland, Hungary and the Soviet Union, tied to the old Pandectistic system derived ultimately from Roman law. Only in some of the most doctrinaire of the communist people's democracies, such as the DDR or Czechoslovakia, was the reform to expunge all vestiges of the old system.[11]

## How does the book contribute to the debates?

The issues of law, totalitarianism and tradition are ones that have motivated scholars of law, history and politics in many ways. The book touches upon three important debates

on intellectual history: (1) the use of the past in totalitarian regimes, (2) the impact of émigré scholars and (3) the emergence of the European project.

The contemporary significance of the study of ancient culture has been the subject of increasing scholarly interest.[12] The political importance of classics in the twentieth-century totalitarian regimes has been an important subfield, where researchers have discussed how the totalitarian regimes, especially the Fascists in Italy, used ancient Rome as an example and justification for their policies of militarization and aggression (Nelis 2007). For the study of the classical past, this meant that the object of their study was made to conform to the expectations of the present, sometimes in very confusing and contradictory ways, such as precursors to racial policies. Important studies have demonstrated how the position of Roman law varied from being under threat to being co-opted by the regime (Miglietta and Santucci 2009), but concerted study of the impact in the field is still lacking. In the current volume, the chapters by Chapoutot and Cascione, among others, offer important starting points for this.

The scholarship on émigré intellectuals is a fast-growing field, in which the first generation consisted mostly of purely biographical studies of émigrés, for example, the some 20,000 intellectuals (among whom were some 2,000 professors) who left Germany in the 1930s. The second generation of studies has explored the impact that this transfer had in Britain and the United States, where new areas of research were born and others were revitalized with the influx of new talent from Germany and Italy (Fermi 1968; Ash and Söllner 1996; Rösch 2014). For legal scholars, the study has thus far been concentrated on the biographical aspect, with works like *Jurists Uprooted* (2004) detailing lives of émigré legal scholars, including some Roman lawyers like F. Schulz and D. Daube. Beyond that, the impact of their work in Britain, the United States or Germany after the war is still mostly unexplored.[13] The chapters of Tuori, Kmak, Giltaij and Atzeri follow the process of change and adaptation through several examples.

Of the vast scholarship on the European integration or the idea of Europe, there have been only a few works that investigate the history of the turn to Europe in historical scholarship after the Second World War (Kaelble 2001; Schulz-Forberg and Stråth 2010). While the European project has always presented itself as a counter reaction to totalitarianism, critical studies such as *Darker Legacies of Law in Europe* (2003) have showed how Nazi legal thought held many of the same ideas as the European integration.[14] With regard to the impact of Roman law in the European project, the more prominent works have dealt with the way Roman jurisprudence actually influenced different European legal cultures[15] rather than with how Roman law was used as part of the European project. In the current volume, the works of Beggio, Quaglioni, Stråth and Berger offer important points on how the concepts of history, culture and crisis were utilized in the workings of the European discourse.

In conclusion, the book seeks to fill an important lacuna in the academic debate and brings together scholarship that addresses the issues of the use of the past and totalitarianism, knowledge transfer and emigration and the birth of the European idea as a reaction to the totalitarianism of the 1930s. The main contribution of this book is that it presents for the first time the development that led to the shared conviction that Roman law is the common foundation of European legal culture. The book will

demonstrate how behind that development there are coincidences and human tragedy and how the idea of the role of Roman law was in part a political statement against totalitarianism. However, what it argues is that the vision they offered was a deeply conservative one, an idea of turning to the past in a period of tremendous social, economic and political upheaval. While works like *Jurists Uprooted* have shown the importance of the exiles and their work, what we are adding is the crucial connections that the exiles still had both in their countries of origin and, as importantly, in their new homelands, the network of people who aided them, read their work and promoted their cause in desperate times. As works like the *Darker Legacies of Law in Europe* were instrumental in establishing crucial continuities from the totalitarian regimes to the present Europeanist discourse, the present work offers a different take, one that seeks to step back from the value judgement and to discuss the individuals on their own terms.

The chapters of the book follow a broadly thematic order, from the conflict of ideas in the 1930s to the totalitarianism and exile experience and finally the roots of the European thought. The first half of the book will explore the exile experience and its implications in knowledge production about the meaning and understanding of history between the Continental and the Anglo-Saxon traditions. The second half will address the Nazi and fascist ideas of Europe and the culture of the past and their role in the making of the European historical narratives.

In Chapter 1, Magdalena Kmak examines the effects of exile with a study on the experiences of legal scholars exiled by Nazi Germany and their impact in British and American legal academia. She maintains that the exile process is a complex cultural exchange where the exiles could act as bridges between academic cultures, but that the position of legal scholars in exile was extraordinarily hard due to the national insularity of the profession. Despite this, within the vast scale of the scholarly exodus, she points out the number of exceptional characters, such as Franz Neumann or Otto Kirchheimer, whose experience in exile produced important contributions to the theory of law and totalitarianism. Kaius Tuori continues, in Chapter 2, on the impact of the exile experience in Britain on three prominent Romanists: Fritz Schulz, Fritz Pringsheim and David Daube. He argues that the exiles were forced to reimagine their work in a new context, speaking to a new audience and leading to the working through of their experiences and observations both in Germany and Britain. The result was a surge of unconventional and creative scholarship that redefined the field.

In Chapter 3, Lorena Atzeri examines the fundamental role of Francis de Zulueta in shaping the attitudes towards Roman law and totalitarianism in Britain and the reception of exiled Romanists there. An important figure in the resurgence of Roman law in Britain, de Zulueta was a controversial figure, a Spanish conservative and supporter of Franco who nevertheless dedicated himself to aiding exiles from Nazi Germany. Jacob Giltaij, in Chapter 4, compares the contradictions between the legal ideals of Schulz and Franz Wieacker, a younger Romanist working with the Nazis but later fundamental to the creation of the idea of the European legal heritage. Giltaij focuses on the image of the Roman jurist in the works of Schulz and Wieacker, presenting them as opposites in the political spectrum but at the same time sharing a fundamentally similar conception of the Roman jurist as a creative vehicle behind legal

change, a central theme in the idea of a shared European legal heritage. In Chapter 5, Dina Gusejnova illustrates how the percolation of contemporary issues through the classical world was not limited to German émigrés in Britain, but was part of a larger academic culture. She raises the example of Baron Taube, a Russian exile writing on the Roman and Byzantine roots of legal internationalism as a counter narrative; Taube was actually an exile in Nazi Germany, not from it.

Beginning the second half of the volume, Johann Chapoutot, in Chapter 6, examines the complicated path of Roman law in Nazi Germany and its development in relation to the alliance with Italy. He demonstrates how the resistance to Roman law stemmed from the ideas of communality and shared ownership of land that were thought to be the essence of Germanic culture. In Chapter 7, Cosimo Cascione shows how the Italian fascists used Rome as their foundational idea and projected that into the national and legal discourse and how it influenced Roman law. Cascione illustrates how the Roman law foundation played a contradictory role in the fascist reverence of *Romanità* and the will to enact a legal revolution and to reject liberalism. In Chapter 8, Hans-Peter Haferkamp takes an example of the principle of fidelity and how its Roman and Germanic roots were balanced during and after the Nazi era in German legal thought. Using the discussions on the principle of *aequitas* and the role of Pringsheim in them, he establishes how the debate on general principles was ongoing even before the Nazi takeover. The fears of the risks that reliance on the general principles would have to the rule of law were then largely realized in the Nazi jurisprudence, where these principles were then utilized to revert the meaning of law. In Chapter 9, Tommaso Beggio focuses on Paul Koschaker, who first presented the common legal roots of Europe as a source of cultural unity. Koschaker is a central character in the formulation of the idea of the crisis of Roman law in the 1930s and equally in creating the response to the crisis in the idea of a cultural unity in law. Far from presenting him as a committed Europeanist, Beggio critically evaluates how Koschaker skilfully navigates between the earlier Europeanist discourses and the Nazi conceptions of European civilization in his defence of Roman law. In Chapter 10, Diego Quaglioni takes a different example of the sense of crisis in the legal tradition in the writings of famous Dutch historian Johan Huizinga. A stern anti-fascist, Huizinga would see the European crisis as a sign of the weakening of Western civilization, and only the restoration of the ideal of humanity and law would create a moment for the restoration of Europe.

Balancing between the themes of rupture and continuity, in Chapter 11, Ville Erkkilä focuses on the thinking of Franz Wieacker and the position of Roman law and legal history in the development of law. He traces the changes in Wieacker's theories after the war years and his re-foundation of law as wisdom, where civilization and heritage were the marks of the advance of rationality and the correct law. Wieacker's theories of the historical nature of law and the legal profession were later fundamental in the formation of the idea of the European legal heritage. In Chapter 12, Paul du Plessis takes a similar stance in Britain, where he traces the way the foundational role of Roman legal tradition was conceived in Scotland in contrast to England. Dismissing the Europeanist theories of Scots law as a model for European integration, du Plessis demonstrates how independent and peculiar the development of the Roman law tradition was in Scotland. In Chapter 13, the connection of history and nationalism

takes centre stage as Stefan Berger examines how the search for authenticity and national uniqueness in nationalistic historical writing conflicted with the rise of Europeanist thought after the Second World War. Berger maintains that claiming to be special continues to be a very common theme in nationalistic historiography around Europe; but the linkage between historical writing and identity has evolved in unprecedented ways since the Second World War. What remains to be seen is how these nationalistic conventions of identity and history can be combined with a European narrative.

In the concluding chapter, Bo Stråth presents crisis as a continuum of Europeanist thought, setting the different crises such as the economic crises, value crisis and the crisis of science as generative moments, where responses such as Husserl's crisis of European science create the path forward. Starting from the roots of the European crises of the 1930s, as a value crisis that influenced science, economics and political thought, Stråth presents movements like the Roman law revivalism and ordoliberalism as attempts to find a new path between law, economics and politics in Europe. In his final point, Stråth presents a gloomy picture of the future of Europe in the face of the current financial crises and shows how both ordoliberalism and a retreat to a shared legal heritage are both insufficient: yesterday's answers to a new kind of crisis.

Due to the continuing interest in the history of Nazi Germany and Fascist Italy as well as the roots of the European project of unification, the relevance of these issues extends much beyond the boundaries of Roman law scholarship. The book seeks to move beyond the purely biographical work, attempting to encompass the breadth of the migration of jurists and the intermingling between exiles and those who stayed, their interactions before and after the war. The second critical input the book seeks to make is to address the reaction, largely inspired by Carl Schmitt, to the enthusiasm of the 1990s on European unification. While those works presented a criticism of the enthusiasm of the 1990s (a theme evident in *Darker Legacies of Law in Europe*), this book attempts to provide a critical analysis of the multifaceted consequences of the crisis and reformulation of the European legal heritage. Due to the ongoing crises, there is a clear opening for this kind of argument on the uses of the past and the influence of exile on scholarship. Through both the crisis of the European project and the influx of refugees, the issues analysed have gained a new relevance.

The idea of a return to a shared European legal heritage, one characterized by its foundations in Roman law and the civilian tradition, emerged as a response to a crisis. This crisis was not only brought about by Nazism and fascism; it was equally a response to the crisis of modern society and its values. This response, of looking backwards to see the future, was in many ways conservative and focused on the legal profession as a privileged segment of society. Its original framers, the exiled lawyers and scholars, were concerned with the impact of unchecked political power, not only of tyranny but also of demagogic democracy, in the field of law. The lure of tradition, civilization and culture was in part in their anti-modernity, in the return to a simpler and more refined era. During the post-war years, this traditionalist movement coincided with the European integration and was pushed into the limelight. Resorting to the past as a way to the future was also beneficial to the European project that was struggling with the stubbornness of national traditions and legislation. By resorting to the past, one could gain legitimacy for the project without resorting to references to the legislation emanating from Brussels.

## Notes

1 This process of reinterpreting the past for the remaking of the future may be understood through Assmann's term *Mythomotorik*, the complex of narrative symbols and evocative stories that influences the understanding of the present and the future. See Assmann 1992, 2008, 2010.
2 See the different portrayals, for example, in Corcy-Debray 2001 and Grimal, Carcopino, and Ourliac 1981. The Vichy 'National revolution' was defined by anti-communism, anti-Semitism and Anglophobism; its definition of Europe was defined by the same characteristics. See Corcy 2005. After the war, Carcopino was imprisoned and tried, but acquitted due to 'services to the resistance'.
3 Fink 1989: 251. The protection of Marc Bloch has been attributed to the fact that Bloch's father had been Carcopino's teacher. In 1944, Bloch, who had refused to go into exile, was arrested by the Vichy police. He was questioned and shot by the Germans shortly afterwards.
4 Paragraph 19 of the NSDAP party programme from 1920 called for the abolition of 'materialistic' Roman law and its replacement with German national law.
5 Whitman 2003.
6 Just one example is Legrand 1999: 76–7. More groundbreaking is Osler 2007, which exposes the political agenda and its implications for the history of reception.
7 See, for example, Hondius 2011: 3.
8 For a rare level-headed introduction to these different initiatives, see Miller 2012.
9 Eidenmüller et al. 2008. The aim of these projects is the future final Common Frame of Reference that would function as a framework for the harmonization. On the national side, see Comparato 2014.
10 The main points are outlined in Zimmermann 2007. For more emphasis on the tradition, see Zimmermann 2001. On homonymy, see Zimmermann 2002.
11 Wołodkiewicz 2009.
12 See, for example, Tziovas 2014; MacMillan 2009.
13 Beatson and Zimmermann 2004, see also Graham 2002: 777; Lutter, Stiefel and Hoeflich 1993; Breunung and Walther 2012 (second volume forthcoming).
14 Joerges and Ghaleigh 2003. Even more pointedly, Laughland 1998.
15 Zimmermann 2001; Stein 1999; Wieacker 1996. Critical scholars have expressed doubts about the role of Roman law as a foundation for European legal culture; see Wijffels 2013; Osler 1997.

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